No. 20620

IN THE

United States

Court of Appeals

For the Ninth Circuit

HARLOW H. OBERBILLIG, as administrator of the Estate of J. J. Oberbillig,

Appellant,

vs.

BRADLEY MINING COMPANY,

Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

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JURISDICTIONAL STATEMENT

Jurisdiction in the United States District Court for the District of Idaho, Southern Division, was established pursuant to the requirements of 28 USCA 1332, upon diversity of citizenship, plaintiff being a resident and citizen of Idaho. (T.R. 35-36, 50), defendant being a California corporation with principal place of business in California (T.R. 36, 50), and the amount in controversy, exclusive of interests and costs, exceeding $10,000.00 (T.R. 6, 50).

This court has jurisdiction to hear the appeal under the provisions of 28 USCA 1291 and Rule 73,

Federal Rules of Civil Procedure, the appeal being from a final judgment dismissing appellant's complaint.

STATEMENT OF THE CASE

Simply stated, this is a case where one party (the appellant) conveyed a group of mining claims to another (the appellee) in return for a promise to pay royalties on any production and with the express provision that the latter should have sole discretion as to if, when, and how it would work the claims. The appellee went onto the property, built an entire town around its production, and produced extensively for some 10½ years, paying royalties in the process amounting to more than 1.4 million dollars. Then, without objection, and with subsequent assurance by the appellant that it had the right to mine or not to mine as it saw fit, the appellee ceased operations and began tearing down the town. Now, more than 12 years later, the appellant seeks return of the property and recovery of damages for failure to mine. The district court dismissed the complaint for failure to state a cause of action, and the appellant has appealed.

The document of conveyance, entitled "Conveyance, Royalty Agreement and Option" (T.R. 8-23) was executed by the appellant's predecessor, United Mercury Mines Company, and the appellee, Bradley Mining Company, under date of December 31, 1941. By its terms it was agreed that United:

> "for and in consideration of the royalty hereinafter agreed to be paid by BRADLEY, its successors and assigns, to UNITED, its successors and

assigns, and in consideration of the mutual covenants and agreements herein contained, and subject to the royalty hereinafter reserved and retained, and the mortgage herein created to secure the payment of said royalty, has granted, bargained, sold and assigned, and does by these presents grant, bargain, sell and assign, unto BRADLEY, its successors and assigns," (T.R. 8)

certain lode and placer mining claims in the Yellow Pine Mining District, Valley County, Idaho, together with certain easements of tailing pond and water rights of way, millsites, warehouses, etc.

In consideration of the above, the appellee agreed to pay to United a royalty of five percent on all net smelter returns from "all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken" from the specified premises for a period of "nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property." (T.R. 14)

The document provided that the appellee would furnish UNITED "all necessary information that UNITED may require to assure it that it is receiving the royalty to which it is entitled hereunder" (T.R. 14-15) and that the covenants on the part of the appellee to pay the royalty would be considered covenants running with the land (T.R. 16). It then provided:

"It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described

> mining claims shall be in the sole discretion of BRADLEY, its successors and assigns, and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made thereby." (T.R. 16)

The document further provided:

> "Anything in this agreement contained to the contrary notwithstanding, it is the intention of the Parties to this agreement that the full ownership, possession and control of all the properties above described, and the full ownership, possession and control of all the properties hereinbefore in this instrument conveyed, and all of the personal property acquired and/or used on or in connection with the operation and development of the above described properties, shall be vested in BRADLEY, and the UNITED shall have no interest in fee in or to said properties . . ." (T.R. 16)

except that United was to have a mortgage lien to the properties to secure payment of the agreed royalties (T.R. 16).

The document also granted to the appellee an option to acquire certain other lode mining claims within one year following (T.R. 17-23). And, in Paragraph IX thereof, it stated that:

> "It is agreed that this conveyance and agreement to pay royalties and option agreement settles and adjusts all claims of every kind and character which UNITED has against BRADLEY, the F. W. Bradley Estate, the Yellow Pine Company, and the Bradley Mining Co., on account of any non-performance by F. W. Bradley, the Yellow

Pine Company and/or the Bradley Mining Co.; . . . and that after Midnight, December 31, 1941, the effective date of this instrument, all other contracts between the Parties hereto shall be held and considered merged in this instrument, . . ." (T.R. 22.)

Appellee entered upon the mining properties and explored and mined them from 1941 until July 26, 1952 (T.R. 38), extracting therefrom gold, silver, antimony, and tungsten in substantial quantities (T.R. 41-42). As a result of its operations and pursuant to the agreement, the appellee has paid to United Mercury Mines Company the sum of $1,463,-754.43 as royalties (T.R. 26).

In 1951, the appellant's predecessor in interest filed an action in United States District Court for the District of Idaho, Southern Division, reported on appeal as *United Mercury Mines Co. v. Bradley Mining Co.*, 259 F.2d 845 (the records, files and exhibits of which have been transmitted to this Court for inspection pending final disposition of the appeal herein, T.R. 117), which case involved the same properties, mining claims and "Conveyance, Royalty Agreement and Option" referred to above (T.R. 26).

In 1952, with full knowledge of appellant's predecessor in interest and without objection of any kind, the appellee ceased mining operations on the property in question and began removal of the mining, milling and smelting equipment therefrom shortly thereafter, completing the removal of the equipment during the year 1958 (T.R. 26-27). In 1955, 1957, 1960 and 1963, the appellee reconveyed to United certain of the mining claims involved, at the same time retaining others (T.R. 43-44).

On February 27, 1957, some five years after the appellee's cessation and termination of mining operations on the property herein involved and after reconveyance of certain of the aforementioned claims, a pre-trial conference was held in the District Court in the suit mentioned above. At that conference, Mr. Casterlin, as an attorney for United Mercury Mines Company, stated the following:

> "I am trying to explain why a good portion of the contention of the defendant is not applicable here because the relationship of lessor and lessee existed up until 1941. On December 31, 1941, the new contract provided that the title to this property would pass to Bradley, Bradley then owned it. Under this new agreement as quick as Bradley owned the title to the claims, owned the title to all the minerals that were produced, then it was their property to do with as they saw fit. And this contract of 1941 contains a peculiar provision that Bradley could work this property as, if and when it desired. It could let that property stay there forever and not work it. In other words, Bradley not only owned the claims, Bradley owned the minerals, everything that was produced up there. It could do as it saw fit with those things." (Page 39 of the Reporter's Transcript of Pre-trial Conference, T.R. 117.)

On January 7, 1965, more than 12 years after cessation and termination of mining operations and nearly seven years after completion of removal of the equipment involved, the appellant filed the instant action, seeking judgment for damages in the amount of $107,485.50 and for reconveyance to the appellant of the mining claims still held by the ap-

pellee (T.R. 6 and 39). The complaint, as amended (T.R. 35-40), alleged that there were and are large quantities of commercial ore on the premises that could be mined by the appellee, that the appellee is required under the aforementioned agreement to mine, mill and produce said minerals, and to pay to appellant the specified royalty thereon, and that the appellee has refused to do so, notwithstanding demand therefor by the appellant (T.R. 38-39). The appellee filed a motion to dismiss, alleging that the complaint filed to state a claim upon which relief could be granted (T.R. 24). The motion was treated and heard as a motion for summary judgment (T.R. 46) upon the amended complaint (T.R. 35-40) and the affidavits of Eugene C. Thomas (T.R. 26-27) and Harlow H. Oberbillig (T.R. 41-44). The court entered its memorandum decision (T.R. 46-48) granting the summary judgment and entered findings, conclusions (T.R. 49-54) and judgment (T.R. 55-56) thereon.

Appellant has now appealed to this Court.

SUMMARY OF POINTS

1. The express terms of the conveyance, royalty agreement and option leave no room for an implied covenant to develop in that the appellee was given sole discretion as to time, amount, extent and manner of operations and it was provided that failure to mine would not defeat the conveyance.

2. Since the decision as to when to mine is within the sole discretion of the appellee, the appellant may not substitute his own judgment as to when to mine.

3. The appellant's claim is barred by the five-year statute of limitations provision of Section 5-216 of the Idaho Code.

4. The complaint failed to allege compliance with the possession requirements of Section 5-203 of the Idaho Code.

5. The appellant has acquiesced in the appellee's position that it has no duty to mine, has waived any claim based upon a duty to mine, and is estopped from asserting any duty to mine.

6. Prior litigation between the appellant's predecessor and the appellee is res judicata as to this action in that the matters involved here could have been raised in the prior action.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DISMISSED THE APPELLANT'S COMPLAINT, BECAUSE IT ALLEGED NO FACTS THAT WOULD CONSTITUTE A BREACH OF ANY TERMS OF THE CONVEYANCE, ROYALTY AGREEMENT AND OPTION, SINCE THE DECISION OF WHETHER TO MINE, AND HENCE BECOME LIABLE FOR ROYALTIES, IS WITHIN THE SOLE DISCRETION OF THE APPELLEE.

By its express terms, the Conveyance, Royalty Agreement and Option alleged in the complaint provides that the decision as to whether the claims should

be mined is within the sole discretion of the Bradley Mining Company. It then explicitly states that the failure to mine shall not result in a forfeiture:

> "It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of BRADLEY, its successors, and assigns, and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made hereby." (T.R. 8)

The document is also explicit in providing that no royalties are payable under any circumstance except on a cash basis and during the actual operation of the property. A royalty is due on "all net smelter returns" upon and for minerals "mined, extracted or taken" from the mining claims (T.R. 14). Said royalty is payable only for months "when any net smelter, mint, or other returns are received by BRADLEY" (T.R. 14).

Thus it is manifest from the clear and unambiguous terms of the written agreement of the parties that the appellee could operate or not operate the property as, within its sole discretion, it elected to do. If it did not operate, it had no obligation to pay royalties. Absent bad faith or fraud—neither alleged here—there could be no right of action by the appellant for any failure by the appellee to mine.

The appellant now contends that the Court should find in this clear and unambiguous document an implied obligation and covenant to reasonably explore and develop the mining property. Such a contention

is clearly without merit. Where the parties have expressly covered the subject in their written agreement, there is no room for an implied covenant to the contrary.

The general rule is succinctly stated in 20 Am. Jur. 2d, Covenants, Conditions and Restrictions, Section 12, at pages 584-585:

> "(I)mplied covenants are not favored in the law. The courts will declare implied covenants to exist only where there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purpose of the parties to the contract made. Such covenants can be justified only upon the ground of legal necessity arising from the terms of a contract or the substance thereof, and the circumstances attending its execution. The implication from the words must be such as will clearly authorize the inference of an imputation in law of the creation of a covenant. It is not enough to say that the covenant is necessary to make the contract fair, that the contract ought to have contained a stipulation which is not found in it, or that without such covenant the contract would be improvident, unwise or operate unjustly.
>
> "Implied covenants can arise and will prevail only where there is no expression on the subject matter of the implied covenant, *and an express agreement or covenant excludes the possibility of an implied one of a different or contradictory nature.*" (Empasis added)

An argument substantially identical to that of the appellant was considered in the case of *Warren v.*

Amerada Petroleum Corp., 211 S.W. 2d 314, in which the plaintiff brought suit upon an oil lease, alleging the failure of the defendant to drill a well and contending the existence of an implied covenant in the lease that drilling would begin within a reasonable time. The lease contained the following provision:

> "During the said (primary) term, except as may be otherwise required by paragraph 3 hereof, lessee shall have the right at will to begin, abandon or resume operation on the premises."

The Texas court ruled that the plaintiffs had failed to state a cause of action, responding to the contention that there was an implied covenant with the following statement, at page 317:

> "But there is no room for an implied covenant where the lease contract itself makes the matter of development discretionary with lessee at his own will as was obviously the case in the original lease executed by Bell to lessee. The terms of that lease and the intention of the parties are clearly expressed in plain language and courts will not undertake to write a new and different contract or to change the terms of one when the parties have stated their intentions clearly and in simple language. Cowden v. Broderick & Calvert, 131 Texas 434, 114 S.W. 2d 766, 177 A.L.R. 61. The original lease above referred to contains an express covenant which precludes the application of any implied covenant for prudent development or for development within a reasonable time (Citing cases)"

The appellant here mistakenly places reliance on a case such as *Kentucky Rock Asphalt Co. v. Milliner*,

234 Ky. 217, 27 S.W. 2d 438, where the agreement between the parties was silent as to the duty of the grantee, or a case such as *Downing v. Rademacher*, (Cal), 65 Pac. 385, 71 Pac. 343, where the parties expressly agreed that the grantee or lessee should mine, but neglected to specify when. Here, the parties left no room for implication because they explicitly covered the complete subject of the appellee's obligations.

Likewise inapplicable are the other cases cited by the appellant in which the parties have expressly specified some duty on the part of the grantee to develop or begin developing the property, such as *Bardhill v. Sellers (Ky)*, 298 S.W. 2d 5, where the grantee was to drill at least one well within two years; *Sledge v. Stolz (Cal.)* 182 Pac. 340, where the contract provided that once the grantees had commenced work they should "diligently continue and prosecute such work" until they considered it not profitable; and *Rocky Mountain Fuel Co. v. Clayton Coal Co.*, 110 Colo. 334, 134 P.2d 1062, which involved a lease providing for a minimum annual production once begun by the lessee; or cases such as *Payne v. Neuval (Cal.)*, 99 Pac. 76, which involved an agreement calling for a royalty on 300 tons annually, whether taken or not. Here the parties set no requirement for beginning or continuing production, but specified explicitly that the appellee should have sole discretion as to "time, amount, extent and manner" of operating the claims and that royalties should be payable only when there was actual production.

The conditions under which a court will find an implied provision in a written document are well

described in *Dancinger Oil & Refining Co. of Texas v. Powell (Texas)*, 154 S.W. 2d. 632, another case cited and quoted extensively in the appellant's brief. In that decision, the court stated, at page 635:

> "In the outset it should be noted that when parties reduce their agreements to writing, the written instrument is presumed to embody their entire written contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole. An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole. (Citing cases)"

The *Dancinger* case is also authority for the proposition that there is a much stronger reason for favoring an implied covenant under an ordinary lease than in the case of a conveyance of the minerals. The appellant devotes much of his brief to an apparent

contention that the document involved here was a lease rather than a conveyance. However, he fails to meet the fact that, in addition to using language of conveyance throughout, the parties expressly provided:

> "Anything in this agreement contained to the contrary notwithstanding, it is the intention of the Parties to this agreement that the full ownership, possession and control of all the properties above described, and the full ownership, possession and control of all the properties hereinbefore in this instrument conveyed, and all of the personal property acquired and/or used on or in connection with the operation and development of the above-described properties, shall be vested in BRADLEY, and the UNITED shall have no interest in fee in or to said properties . . ." (T.R. 16)

Thus, what we have here is clearly a conveyance.

What the appellant seeks is to have the Court rewrite the agreement of the parties. The Conveyance, Royal Agreement and Option as written is a clear expression of the intention of the parties—there is nothing from which to presume an implied covenant to produce.

In the first place, as stated before, the parties expressly covered the complete subject by providing that the appellee should have "sole discretion" as to "the time, amount, extent and manner" of the operations. Furthermore, they expressly covered the possibility that the appellee might fail to mine, by providing "that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance." No case cited as authority by the appellant involved an agreement like this—where the very

circumstance sought to be covered by an implied covenant has actually been covered by an express provision to the contrary!

In addition, we have here an agreement resulting from an armslength transaction between knowledgeable mining companies who had been dealing with each other for years (T.R. 22). There is nothing like the relationship between the big oil company and the little unsophisticated farmer to suggest that one party could take undue advantage of the other. Likewise, unlike the oil and gas cases is the fact that the minerals here are stable substances—they are not going to go anywhere unless the appellee mines them, and then the appellee must pay royalties. Nor can any third party come in and drain away the resources and thus deprive the appellant of his royalty, as might be the case with property over a common oil or gas pool where failure to develop diligently may result in the pool being drained by operators on adjoining land. The very fact that the agreement to pay royalties was agreed to remain in effect for 999 years plus is an indication in and of itself that the parties must have contemplated periods of inactivity. It would be inconceivable that they could otherwise even consider such a term for the agreement.

It is also significant that the Conveyance, Royalty Agreement and Option here was expressly stated as being in settlement and adjustment of existing disputes between the parties. This alone would constitute adequate legal consideration for whatever other provisions might be contained.

As to further consideration, we can only speculate as to what sort of royalty the parties might have agreed to if the conveyance had included an obliga-

to development controlled, stating the following at pages 1170-1171:

> "The trial court did not err in sustaining the general demurrer to the second count of the petition in which plaintiff in error sues for damages on a count of failure of defendants in error, after the discovery of oil in paying quantities upon the 160-acre tract, to continue reasonably to develop the said tract by drilling and equipping other wells. The implied obligation to develop with reasonable diligence would have arisen after the discovery of oil in paying quantities in the first well if the parties to the lease had not contracted with respect to the development of the leased premises. (Citing cases) The lease is not silent upon the subject of development. It requires the lessee in the event of production on adjoining land to drill proper and necessary offsets and then provides: 'Lessor agrees that all other developments shall be at the discretion of the lessee.' The judgment or discretion of the lessee exercised in good faith is not the same measure for the lessee's obligation in the matter of development as the reasonable development required by the implied covenant which arises in the absence of expressed stipulation as to development."

Cases subsequent to *Cowden* have made it clear that in order to found a cause of action when the discretion to develop or operate is given to a lessee or grantee there must be a showing of bad faith amounting to proof of fraud. in *King v. Swanson*, 291 S.W. 2d 773, the court dealt with leases containing the provision that "all operations of said leases shall at all times be within *the sole discretion* of the

undersigned assignor, its successors and assigns . . ." (Emphasis added) The case was tried on the theory that there must be a showing of bad faith on the part of the lessee. In reversing a judgment for the lessor, the court stated the following at page 775:

> "Proof of bad judgment is not proof of bad faith. To prove bad faith some improper motive must be shown."

In explaining the decision, the court noted that the failure to develop affected one party in the same manner as the other, the implication being that when discretion is vested in one party with the profit motive, the other should not be able to substitute his judgment in the absence of a showing of bad faith in the exercise of the discretion. This consideration is particularly significant here because of the virtually perpetual nature of the royalty agreement. It must have been contemplated by the parties that there would be periods of inactivity within the term.

In the case of *Gex v. Texas Company*, 337 S.W. 2d 820, the Texas court dealt with a "mineral deed" executed by the plaintiff to the defendants. The deed provided that the decision as to drilling or mining both before and after production was wholly at the option of the grantee and that payment of a royalty was contingent upon production. The plaintiff alleged that there was a question as to whether the grantee had acted as a reasonably prudent operator in marketing the gas. The court granted summary judgment for the defendants, holding that the express covenant eliminating any obligation to develop or produce precluded any implied covenant to market. Quoting from a prior opinion the court stated the following at page 827:

> "There being no allegation of fraud, accident or mistake and no attempt by the parties to reform the mineral deed, the court will give effect to the intention of the parties as expressed by the terms and provisions of the instrument."

Nothing in the record indicated an improper motive on the part of the grantee, and, therefore, the express provisions of the mineral deed controlled to defeat the action.

Even where parties have expressly agreed that a lessee would develop the property, the courts have refused to second-guess the judgment of that lessee, in the absence of a showing of fraud. In *Kellar v. Craig*, 126 Fed. 630, the plaintiff alleged forfeiture of a lease for oil and gas rights on the grounds that the defendant had failed to "well develop" the land leased. The court sustained the defendant's demurrer, and in discussing the covenants to protect lines and to develop the property, stated the following at page 633:

> "In such leases, where general covenants of that character are found or are implied, the lessee or his assigns are permitted to determine the character of the work to be done, and such ascertainment by him or them, in the absence of fraud, disposes of the question."

In the present case, there not only is no express covenant to develop, the parties have explicitly agreed that the entire question of operations shall be at the sole discretion of the appellee. Thus there is no room for application of any standard except the judgment of Bradley Mining Company so long as exercised

without a fraudulent intent, or, at the very least, without bad faith. Again, it is significant that the present cause does not involve oil and gas. Wilson I. Snyder, Mines & Mining, Vo. 2, Sec. 1181, points out that "oil and gas being the most uncertain, fluctuating, volatile and fugitive of minerals, a more rigid rule should be applied in the construction of such leases than in the case of ordinary minerals, and, unlike ordinary mining leases, they will be construed most strongly in favor of the lessor." The cases cited above have been concerned primarily with oil and gas leases, which the courts would strictly construe in favor of the lessor. Yet even there the courts have enforced the agreement which the parties have made, and when there has been an agreement that discretion shall be in the hands of the lessee, the courts have respected that provision.

Here there is no suggestion that the minerals involved are transitory or likely to be dissipated and hence cause a loss of resources or of royalties. Nor is this a short term lease whose purpose might be defeated by failure to mine or develop for a period of time. The length of the term in which royalties must follow production is built in "protection" for the lessor. Nor is this a case like *Clark v. Wilson (Ky.)* 316 S.W. 2d 693, or *Downing v. Rademacher, supra,* where there was no significant production by the lessee or grantee, or like *Mountain States Oil Corp. v. Sandoval (Colo.)*, 125 P. 2d 964, where there was production but failure to pay royalties.

Incredible as it seems, appellant contends, in effect, that there has been a failure of consideration. Such is patently not the case! Not only, as noted above, was there settlement of existing disputes between

the parties—consideration sufficient in itself to meet the requirements of the law—there has also been actual development and production by the appellee for a period of some 10½ years. Pursuant thereto, there has been payment by the appellee to the appellant of more than 1.4 million dollars in royalties! And, there remains the obligation to continue to pay royalties whenever, with better market conditions, the appellee elects to return and mine some more.

The appellant, at page 19 of his brief, asserts that the holding of the district court is to the effect that the appellee has the *arbitrary* discretion to discontinue all operations, at any time it deems fit, for so long as it deems fit. This is clearly not so. The appellant attempted to amend the original findings of fact and conclusions of law to preface the word "discretion" as attributed to the appellee with the adjective "absolute" (T.R. 110, 114, 115). The court rejected these proposed amendments, thus holding in accordance with the cases cited above that the appellee's discretion must be recognized and upheld, *absent a showing of fraud or bad faith.* It was not necessary to express the *underlined* phrase because the appellant had failed to put any such allegation in his complaint.

As noted before, what the appellant really seeks is to have the courts rewrite a bargain that he has decided now he doesn't like. An analogous situation has from time to time arisen in cases in which an employee of one party has been disignated as an arbiter of disputes in construction contracts. Thus, in *Choctaw & M. R. Co. v. Newton,* 140 Fed. 225, 232, 233, the court explained the principles and reasoning applicable to such situations:

"In making such a contract the parties dealt with each other at arms length. The contractors were at perfect liberty to consent to the provisions of the contract or to refrain from bidding. They are presumed, before bidding or signing the contract, to have fully advised themselves of the competency, integrity, and judicial fairness of the selected umpire. Their voluntary acceptance of him as the final arbiter on disputed matters, as declared in the contract, precludes them from any consideration or sympathy because of the engineer being in the employ of the railroad company . . . The contractor is presumed to protect himself against possible loss resulting from any adverse judgment of the engineer by the amount of his bid; and when litigation arises over the decisions and award of such an umpire, the courts cannot, without making a new contract for the parties, disregard such positive provisions, or set aside the action of the umpire, except for the most grave and cogent reasons."

The decision continued to state that the showing must be that the arbiter was guilty of fraud or the equivalent of fraud.

In like manner, the court in *Guild v. Andrews*, 13 Fed. 369, 371, stated the following with regard to a contract in which an employee of one party was designated the arbiter:

"A stipulation in a contract like the one here sued upon, making an engineer, inspector or other person, the arbiter of the amount and character of the work done, its conformity to the contract, and the compensation to be paid, is valid and obliga-

tory upon the parties, and the action of the arbiter thereunder is final and conclusive, in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment."

The reasoning of the *Choctaw* and *Guild* cases applies directly to the case at hand. In effect the Conveyance, Royalty Agreement and Option designates the appellee as the arbiter of when and to what extent it shall mine the properties. That discretion cannot be withdrawn except on a showing of fraud or its equivalent. Thus the appellee's decision to cease operations, within its discretion, is final and conclusive. As the complaint alleged only facts conforming precisely to performance within the clear and unambiguous terms of the agreement, it failed to state a cause of action, and it was properly dismissed by the court below.

III

THE DISTRICT COURT PROPERLY DISMISSED THE APPELLANT'S COMPLAINT IN THAT ANY CLAIM WHICH THE APPELLANT MAY HAVE HAD BY REASON OF APPELLEE'S FAILURE TO MINE, MILL AND PRODUCE UNDER THE CONVEYANCE, ROYALTY AGREEMENT AND OPTION HERE IN QUESTION WAS BARRED BY THE FIVE-YEAR STATUTE OF LIMITATIONS PROVISION OF SECTION 5-216 OF THE IDAHO CODE.

It appears on the face of the complaint that the cessation of operations by the appellee alleged to be in breach of the written Conveyance, Royalty Agree-

ment and Option occurred in the year 1952. The appellant or his predecessor could have brought suit at that time. Obviously the mineral deposit (assuming it to exist) which the appellant asserts that the appellee is obligated to mine must also have existed when mining operations ceased in 1952, and continued to exist during all the intervening years. Yet this action was not commenced until January 7, 1965 —more than 12 years after the alleged breach!

In Idaho, actions founded on a written obligation must be commenced within five years. Section 5-216 of the Idaho Code provides as follows:

> "*Action on written contract*—Within five years: "An action upon any contract, obligation or liability founded upon an instrument in writing."

Thus the complaint shows on its face that the cause of action is barred by the statute of limitations.

The appellant contends in his brief that the agreement in question is in the nature of a continuing contract so that according to authorities the person affected at his option may elect the time at which he will seek legal recovery. Such a contention fails to do justice to the facts.

The agreement here, when read together with the alleged breach, was not the sort of contract envisioned by the authorities cited by the appellant where there is something to be done by a promisor year after year and the fact that he doesn't do it one year cannot be taken to mean that he won't perform as required the following year. It did not involve mere failure to exercise good farming practices as in

Union Sugar Co. v. Hollister Estate Co. (Idaho), 147 P2d 273, or failure to drill protective drainage wells as in *Indian Territory Illuminating Oil Co. v. Rosamond (Okla.)*, 120 P.2d 349, the cases cited by the appellant. Here the occurrence alleged as a breach was a conclusive, overt action—cessation of operations, followed by removal of equipment. It is hard to imagine how it could have been any more final.

Even if it were somehow said that a cause of action continued throughout the removal of the mining equipment, that was completed in 1958—nearly seven years before the filing of this action!

Appellant asserts, at pages 22-23 of his brief, that removal of facilities continued until 1964, bringing in question the actual date of the alleged breach. Yet his own affidavit reveals that there was a general auction of facilities in 1957 (T.R. 43)—removal in the years following was merely the aftermath of disposal at the auction. If a general auction of all facilities following cessation of operations and concurrent with removal of mining equipment, did not establish "the breach," if any there be, then what possibly could? And, 1957 was eight years before the filing of the action!

In short, if the statute of limitations has not run as to the appellant's claim, then it never will, and statutes of limitation will be forever meaningless. Here, the provision of the Code is clear. The complaint, on its face, has failed to comply with that provision. Thus, the action is plainly barred, and the court below properly so held.

IV

DISMISSAL OF THE COMPLAINT SHOULD BE UPHELD ON THE FURTHER GROUND THAT THE APPELLANT FAILED TO ALLEGE COMPLIANCE WITH THE PROVISIONS OF SECTION 5-203 OF THE IDAHO CODE.

In addition to the claim for damages, the appellant prays in his complaint that the premises be reconveyed to him. Section 5-203, Idaho Code, provides as follows:

> "*Action to recover realty.*—No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action; and this section includes possessory rights to lands and mining claims."

As urged by the appellee before the lower court (T.R. 64-65, page 16-17 of Reporter's Transcript), the appellant has not alleged compliance with the substantive elements of Section 5-203, Idaho Code, it being incumbent upon him to do so. Thus the complaint fails to state a claim upon which relief can be granted, and its dismissal by the court below must be upheld.

V

DISMISSAL OF THE COMPLAINT SHOULD BE UPHELD ON THE FURTHER GROUNDS THAT (a) THE APPELLANT AND HIS PRE-

DECESSOR IN INTEREST HAVE ACQUIESCED IN THE POSITION THAT THE APPELLEE HAS NO DUTY TO MINE, (b) THE APPELLANT AND HIS PREDECESSOR HAVE WAIVED ANY CLAIM BASED UPON A DUTY TO MINE, (c) THE APPELLANT IS ESTOPPED FROM ASSERTING ANY DUTY TO MINE.

The appellant's complaint alleged that the appellee, Bradley Mining Company, ceased mining activities upon the claims in question in 1952. Yet the present action was not filed until January, 1965. Some five years after the cessation of mining, on February 19, 1957, counsel for the appellant's predecessor in interest made the following statement at page 39 of the Reporter's Transcript of pre-trial conference in the case of *United Mercury Mines Co. v. Bradley Mining Company*, 259 F.2d 845 (U.S.D.C. for District of Idaho, Southern Division, No. 2854, the record of which has been forwarded to this court for inspection pending disposition of the instant case, T.R. 117):

"I am trying to explain why a good portion of the contention of the defendant is not applicable here because the relationship of lessor and of lessee existed up until 1941. On December 31, 1941, the new contract provided that the title of this property would pass to Bradley. Bradley then owned it. *Under this new agreement as Bradley owned the title to the claims, owned the title to all the minerals that were produced, then it was their property to do with as they saw fit. And this contract of 1941 contains a peculiar provision that Bradley could work this property as, if and when*

it desired. It could let that property stay there forever and not work it. In other words, Bradley not only owned the claims, Bradley owned the minerals, everything that was produced up there. It could do as it saw fit with those things." (Emphasis added)

This statement, made five years after mining operations had ceased, was followed by approximately eight years before this action was commenced.

As urged by the appellee before the lower court (T.R. 97-99, page 17 of Reporter's Transcript), even if the conveyance, Royalty Agreement and Option did not expressly vest sole discretion as to mining in Bradley, the authorities recognize that a person may be barred by acquiescence. This has been particularly recognized in the area of restrictive covenants, which are analogous to the arrangement utilized in the Conveyance, Royalty Agreement and Option. Thus, 21 C.J.S., Covenants, Section 119, states the following:

"Long continued abandonment or acquiescence in violation of a restrictive covenant may forfeit the right of relief for defendant's breach thereof."

Similarly, 14 Am. Jur., Covenants, Conditions and Restrictions, Section 295, states the following:

"The right to enforce a restrictive covenant may be lost by waiver or acquiescence. If the party entitled to the benefit of the covenant in any way by inaction lulls suspicion of his demands to the harm of the other or if there has been actual or passive acquiescence in the performance of the act complained, then equity will ordinarily refuse aid."

The Idaho Supreme Court recognized the doctrine of abandonment by acquiescence in *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348.

This case is, of course, much stronger than mere acquiescence by silence to a course of conduct. Here we have the statement of the counsel for the appellant's predecessor in interest at the pre-trial conference in 1957:

> "It could let that property stay there forever and not work it."

In addition, we have a lapse of time amounting to approximately 12 years from the cessation of mining activities on the claims involved and approximately seven years from completion of the removal of the equipment until the commencement of this suit. Surely, one cannot stand on one position, wait years during which potential damages would escalate, and then assert a right to damages and to a forfeiture upon a position directly contrary to what he has agreed upon and acknowledged. And, surely, he cannot be heard, in prior litigation over the same contract and against the same defendant, to take a position considered advantageous to him in that cause and then years later to take an opposite position because it now appears better for him to argue it the other way. Yet that is exactly what the appellant is trying to do here.

In addition to the acquiescence, which is apparent, the record establishes that the appellant and his predecessor in interest have waived any right to assert a duty by the Bradley Mining Company to mine the claims involved. Again, the court's attention is di-

rected to the statements of the counsel for United Mercury Mines Company at the pre-trial conference in 1957 and to the 12-year lapse of time between the discontinuance of mining operations and the commencement of his suit. 56 Am. Jur., Waiver, Section 24, has this to say about such action:

> "One who intentionally relinquishes a known right cannot, without consent of his adversary, reclaim it, for it is well settled that a waiver once made is irrevocable, even in the absence of consideration, or of any change in position of the party in whose favor the waiver operates. A waiver is conclusive on the party waiving and his privies."

It would be a peculiar and unsatisfactory state of the law if one could stand by for years, expressly tell another that he need not act, and then come forward with a claim based upon the other's inaction.

What has been said with regard to acquiescence and waiver applies to bar the appellant's action under the doctrine of estoppel:

> "The doctrine of equitable estoppel is frequently applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he, or those by whose acts he is bound, has acquiesced. Declarations or conduct which might not of themselves amount to an estoppel may become such by acquiescence." 19 Am. Jur., Estoppel, Section 62.

Here we have in addition to the long lapse of time, express recognition by counsel for the appellant's predecessor that under the very instrument involved here the appellee did not have to mine.

Again, we ask the simple question—can a person stand by, tell the one with whom he is dealing that he need not act, and then claim a right for a failure to act? Surely the answer must be no. For these reasons, as well as for those discussed above, the complaint was properly dismissed, and the ruling of the lower court must be upheld.

VI

DISMISSAL OF THE COMPLAINT SHOULD BE UPHELD ON THE FURTHER GROUND THAT PRIOR LITIGATION BETWEEN THE APPELLANT'S PREDECESSOR IN INTEREST AND THE APPELLEE IS RES JUDICATA AS TO THIS ACTION, WHICH RAISES MATTERS THAT COULD HAVE BEEN LITIGATED IN THE PRIOR ACTION.

The court's attention has previously been directed to the case of *United Mercury Mines Co. v. Bradley Mining Company*, 259 F.2d 845, which involved the same mining claims, property, and Conveyance, Royalty Agreement and Option that form the subject matter of the present suit, and to the pre-trial conference held on February 19, 1957. The court below rejected the appellee's contention that that action was res judicata as to the present suit in that the complaint here raises matters that could have been litigated in the prior suit. We contend that rejection of that argument was in error, that the present action is barred by the doctrine of res judicata, and that this Court should so find as an additional reason for upholding dismissal of the appellant's complaint.

The authorities are clear that an appellee may support a judgment by anything in the record, even

though it involves insistence upon a contention which the trial court rejected. See 3 Am. Jur., Appeal and Error, Section 866; *United States v. American R.Ex. Co.*, 265 U.S. 425, 68 L. Ed. 1087, 44 S. Ct. 560.

Again, the statements of counsel for the appellant's predecessor, reported at page 39 of the Reporter's Transcript of the 1957 pre-trial conference, are significant:

> "I am trying to explain why a good portion of the contention of the defendant is not applicable here because the relationship of lessor and lessee existed up until 1941. On December 31, 1941, the new contract provided that the title of this property would pass to Bradley, Bradley then owned it. Under this new agreement as quick as Bradley owned the title to the claims, owned the title to all the minerals that were produced, then it was their property to do with as they saw fit. *And this contract of 1941 contains a peculiar provision that Bradley could work this property as, if and when it desired. It could let that property stay there forever and not work it. In other words, Bradley not only owned the claims, Bradley owned the minerals, everything that was produced up there. It could do as it saw fit with those things.*" (Emphasis added)

This pre-trial conference occurred some five years after the appellant alleges mining operations ceased on the claims involved in this action. The quoted remarks make it clear that the interpretation and meaning of the terms of the Conveyance, Royalty Agreement and Option were raised in that prior action, and that counsel for the appellant's predeces-

sor recognized the clear and unambiguous meaning of the document. The appellant's efforts to raise this issue now that it has once been present in a case and could have been asserted as a claim should be denied under principles of res judicata.

Although the prior case of *United Mercury Mines Co. v. Bradley Mining Company* was filed in 1951, a date prior to the discontinuance of mining by the appellee, it must be emphasized that the pre-trial conference cited above did not occur until 1957, five years after that discontinuance. Barron & Holtzoff, Federal Practice & Procedure, Section 446, points out that an amendment to join the additional claim which had arisen would have been proper at that time:

> "Thus the courts, exercising a wide discretion may allow amendments after pleading time, after issue has been joined, after dismissal of the complaint, after pre-trial conference, when trial is about to begin, during the course of trial, after verdict or judgment, and even on appeal or after remand."

The same text sets forth the principle that failure to so amend and include claims that could properly be presented may be barred under principles of res judicata:

> "No time is prescribed for amendments by leave of court. The question of timeliness rests largely in the court's discretion. "*The judgment may be res judicata not only as to all the issues covered thereby but also as to all that could have been determined if plaintiffs had sought to amend the complaint at the proper time to include another claim for relief.* As a general rule unless the rights

of the adverse party are prejudiced, leave to amend may be allowed at any stage of the case where justice requires." (Emphasis added)

Thus, even though mining ceased after the date of filing that prior action, the issue as to the duty to mine was present prior to and at the time of the pretrial conference and at the time of trial of that action and, as demonstrated by the remarks of its counsel, was known by the appellant's predecessor to have been present.

The appellant's claim should be barred by res judicata, since the construction of the Conveyance, Royalty Agreement and Option was in issue in the prior litigation and since the appellant's claim could have been asserted at that time. Volume 30A, Am. Jr., Judgment, Section 371, states the following:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief. "If the

existence, validity, or construction of a contract or other obligation has been adjudicated in an action, it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject of the two actions is different."

Volume 30A, Am. Jur., Judgments, Section 372, continues as follows:

"The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the question involved in the prior action; the conclusiveness of the judgment in such cases extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. *This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of due diligence.*" (Emphasis added)

The rule has been recognized by the Idaho Supreme Court in cases such as *Gibbs v. Claar*, 59 Idaho 763, 87 P.2d 471, and *Tingwall v. King Hill Irrigation District*, 66 Idaho 76, 155 P.2d 605.

For purposes of res judicata, the appellant in this action is bound by the actions of his predecessor in interest, United Mercury Mines Company. 30 Am. Jur., Judgments, Section 395-399. United Mercury Mines Company litigated the obligation under the Conveyance, Royalty Agreement and Option involved in this case. It raised the issue of the duty to mine,

stating that there was none. It could have amended and asserted a claim for failure to mine—but it did not. Since the issue was present in that case, and since the claim could have been asserted, the appellant's claim in this action should be barred on the grounds of res judicata. Thus the dismissal of the complaint by the court below must be upheld.

CONCLUSION

In short, what we have here is an attempt by the appellant:

1. To have the court rewrite a contract negotiated by and satisfactory to his predecessor in interest, but which he doesn't like, to insert therein an implied covenant directly contrary to the express written agreement of the parties;

2. To disregard the express provision that the appellee shall have sole discretion as to if, when and how to mine and to substitute therefor his own discretion;

3. To reverse the position taken by his predecessor in interest in previous litigation between the parties upon the same written contract and to litigate now in a new action what was clearly in issue then; and

4. To do all of this some seven to twelve years after the cause of action, if any, arose, despite the fact that Idaho law requires an action upon a written contract to be brought within five years.

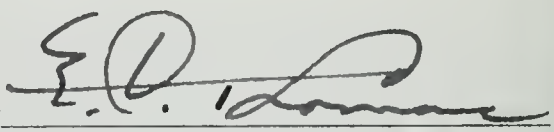
The appellant's appeal is patently without merit. The cases are clear that where the parties have ex-

pressly agreed that one shall have sole discretion as to if, when and how to do something, there can be no implied provision to the contrary and, absent a showing of bad faith amounting to fraud, the other party may not be heard to substitute his own discretion therefor. The appellant here not only expressly agreed, upon abundantly adequate consideration, that the appellee should have sole discretion as to when to mine, he has further agreed that failure to mine should not defeat the conveyance. He cannot now be heard to say the agreement should have been different. It is likewise clear that the appellant's claim is barred by the Idaho statute of limitations, that he is barred by the doctrine of res judicata from asserting a claim that was present in prior litigation between the parties, and that he is further barred by the doctrines of acquiescence, waiver and estoppel.

The district court, fully aware of the Idaho law, as well as the peculiar problems and practicalities of the mining community, properly found that the appellant's complaint should be dismissed as failing to state a cause of action. For all the reasons asserted above, that decision must be affirmed.

Respectfully submitted,

MOFFATT, THOMAS, BARRETT
& BLANTON

By 

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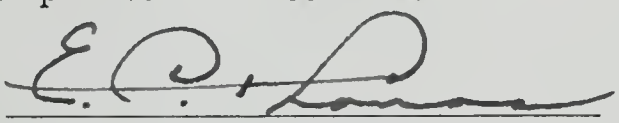
CERTIFICATE

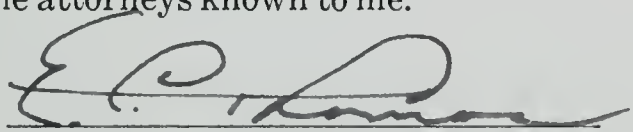
I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Of attorneys for appellee

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of ~~May~~ April, 1966, I served three copies of the foregoing BRIEF OF APPELLEE upon CLEMONS, SKILES & GREEN, attorneys for appellant, by depositing said copies thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at 1110 Bank of Idaho Building, Boise, Idaho, which address is the last address of the attorneys known to me.



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